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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 281

STATE OF UTAH, GEORGE D. FEHR, EARL E. FEHR, JOE LYON, JR., and UNITED WESTERN MINERALS COMPANY, a corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on May 10, 1962.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. A copy thereof is attached hereto. (Tr. 2a) (Appendix A, pp. 1a-7a.) No opinion was rendered by the District Court.

JURISDICTION

The judgment of the court below was dated and entered on May 10, 1962, (Tr. 4) (App. B, p 8a). The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

The question presented is whether the San Juan River east of Chinle Creek in Utah to the Colorado State line was, at the time the Territory of Utah was admitted to the Union as a State (January 4, 1896), a navigable body of water within the legal meaning of that term as applied to the sovereign powers of a state over the rivers and water courses within its boundaries.

STATUTE INVOLVED

The statute involved is the following provision of the Enabling Act approved July 16, 1894 (28 Stat. 107) under which Utah was admitted into the Union: "... thereupon the proposed State of Utah shall be deemed admitted by Congress into the Union under and by virtue of this Act on an equal footing with the original States."

STATEMENT OF THE CASE

The United States brought this action in the Federal District Court of Utah against the State of Utah and its mineral lessees to quiet title to the bed of the San Juan

River east of Chinle Creek to the Colorado State Line, subject to the rights of the Navajo Indian Tribe under certain Executive Orders and the riparian rights of abutting landowners. Jurisdiction was invoked under 28 U.S.C.A. Section 1345. The State of Utah by counterclaim asserted title in itself. The interests of the individual defendants were dependent solely upon the State's title.

The parties stipulated that the United States acquired title to the bed of the River under the Treaty of Guadalupe Hidalgo (February 2, 1848), 9 Stat. 922, and that the Executive Order of May 17, 1884 (1 Kapp 876) extended the boundary of the Navajo Indian Reservation to the middle channel of the San Juan River throughout the section in controversy.

Utah claims that this section of the River was navigable and under the principle of constitutional equality of states, title passed to it upon its admission into the Union (January 4, 1896).

By stipulation of the parties, the pretrial order directed that the issue of navigability be tried first, and if determined in favor of the United States, the case was ended. If that issue were resolved in favor of the State, the boundaries of the bed and the legal effect of the Executive Order of May 17, 1884, were then to be determined.

The United States prevailed in the District Court and in the Court of Appeals.

In 1931, the United States brought an original action in this Court against the State of Utah to quiet title to the bed of the Green River, the Grand River, the Colorado River within the State of Utah, and also that portion of

the San Juan River extending westward from Chinle Creek to its confluence with the Colorado. The Master appointed by this Court found that the San Juan River west of Chinle Creek was nonnavigable. Neither party excepted to this finding. The Green, the Grand and a section of the Colorado were determined to be navigable. Part of the Colorado was held to be nonnavigable. *United States v. Utah*, 283 U.S. 64.

Topography — The San Juan River rises in the high mountains of southwest Colorado, flows into New Mexico, back into Colorado and enters Utah near the corner common to these states and Arizona (Tr. 831). Up to this point several good-sized tributaries have entered it, the largest being the Animas, the Mancos, the La Plata, the Navajo, the Piedra, the Pine and the Florida Rivers. After entering Utah, it crosses an open, level flood plain approximately fifty-five miles where Chinle Creek empties into it. A very short distance from here, it enters the San Juan Canyon through which it flows 133 miles to its junction with the Colorado. The walls of this Canyon are in some places 2,000 feet in height and practically vertical from the water's edge (Tr. 831). Many rapids occur in this sector and large boulders protrude into the water. It is this stretch of the River which was found to be nonnavigable in *United States v. Utah*.

The southeast portion of Utah through which the San Juan River flows was in 1896 practically uninhabited by white men, except for the settlements at Bluff, Montezuma Creek and the trading posts at Four Corners, Aneth and Rincon. Much of the area was unexplored. Farming, stock

raising and mining were the principal industries carried on. The scenery of this region is of an unusual nature, frequently described as fantastic in its beauty and grandeur. It is a matter of common knowledge that extensive recreational projects affecting this wonderland are now being undertaken by the Government. Important discoveries of oil, gas and other minerals have recently been made.

Channel — At the time the settlement of Bluff was established on the River 18 miles above Chinle Creek in the year 1880, the San Juan River flowed in a well defined channel, the banks of which were covered with willows and trees of many years growth (Tr. 561-2). At that time the water shed was covered with forests and vegetation. Since then, it has been denuded by cutting the timber and intensive grazing by livestock. This has taken place for the most part since Statehood. It has resulted in floods which have widened the channel and caused it to braid in some places. This condition presents no problem at all to an experienced boat operator.

The average grade of the River is approximately seven feet per mile, but there are no rapids or swift water above Chinle Creek. The bed is gravel above Aneth, tapering into fine sand as it approaches Bluff. The average depth of the water during low water periods is between two and three feet and the velocity is about five feet per second. The channel averages in width between 150 and 350 feet.

Stream Flow — The stream flow was first measured in October 1914. Daily measurements were made between that date and September 30, 1917. There was an interval from October 1, 1917 to March 20, 1927 when no measurements were made. Thereafter, through 1956 the records are com-

plete. The ganging station was located at Goodrich, a short distance below Chinle Creek.

The River is supplied from a drainage area of more than 23,000 square miles located in four different states (Tr. 322). During the first recorded water year, the discharge was 3,240,000 acre feet and the mean daily flow was 4,374 cubic feet per second. Measured by months the mean flow was; October 2400 c.f.s., November 1580 c.f.s., December 1020 c.f.s., January 1010 c.f.s., February 2330 c.f.s., March 2230 c.f.s., April 8040 c.f.s., May 9270 c.f.s., June 10,000 c.f.s., July 6490 c.f.s., August 1660 c.f.s., September 1050 c.f.s. The mean daily flow was in excess of 3,000 c.f.s., for the entire period covered by the recorded measurements. An experienced boatman, familiar with the River, testified without contradiction that boats of the type in use generally in 1896 could navigate the section of the River in controversy when the stream flow was 700 c.f.s. (Tr. 910). In the first recorded period (1914-1917) the stream flow exceeded 1,000 c.f.s. 77% of each year. If the winter months are excluded, the stream flow exceeded that volume 89% of each year. (Ex 3, 10, 12, 23).

The stream flow at Ship Rock, New Mexico, thirty miles from the Utah line, is not appreciably different from that at Goodrich. Loss from seepage and evaporation between these points apparently is compensated by the water from McElmo Creek, which enters the San Juan fifteen miles below the Utah State line.

All available evidence indicates that the stream flow was greater prior to the date of admission of Utah as a state than it was during the periods when measurements were recorded. Precipitation on the water shed has de-

creased and consumptive use of the water has increased. Approximately two hundred thousand acres of farmland in Colorado and New Mexico are irrigated from water which otherwise would come down the River. It is estimated that about sixty percent of this water returns to the channel. The bulk of the appropriations for irrigation has been made since 1896.

Notwithstanding the decrease in precipitation and the increase in consumptive use since 1896, navigability of the River at the present time was demonstrated by numerous boat trips both up and down the entire disputed sector. Wooden and aluminum boats of various sizes propelled by outboard motors and carrying men and supplies encountered no problems in either low water periods or during the early summer runoff.

Variation in stream flow has been more marked since the water shed has been denuded of forests and vegetation. This has occurred for the most part since Statehood.

Early Use — An extensive use of the River was made in connection with the placer mining industry. Gold was discovered in the bed of the River in 1893. This brought an influx of miners and prospectors from all parts of the country. The boom lasted several years and there were 200 or 300 placer claims throughout the River in Utah. Many boats were used to transport mining machinery, equipment and supplies for use in these placer mining operations. Some of these boats came down the River from Colorado and New Mexico and others were launched at Bluff where supplies and equipment were obtained. A small industry was established at Bluff where boats and barges were built for use of these prospectors.

During this early period, considerable merchandise was taken down the River on flatboats from Bluff to the trading post at Rincon near the mouth of Chinle Creek.

There was also an extensive use of the San Juan River above Chinle Creek in the course of trade between the Indians and the operators of the trading post along the River. The Indians used the boats to bring their wool, hides, blankets and other products across the River and to return with merchandise and supplies. They also used the River in gathering driftwood for fuel. Fur trappers using skiffs, canoes and other small craft came down the River from points above the State line.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Tenth Circuit is in conflict with *United States v. Utah*, 283 U.S. 64, wherein it was held that sections of the Green, the Grand and the Colorado Rivers in Utah were navigable within the contemplation of the constitution and the statute guarantying the equality of the State of Utah with the thirteen original states. The capacity of the San Juan River to contribute to the development of industry, commerce, agriculture and recreation is in all respects comparable to that of each of the above named rivers, except for a difference in stream flow, which is not of controlling significance. Likewise, the obstructions and impediments to navigation of the San Juan were present in comparable degree in each of those rivers. The character and extent of use of all these rivers at the critical point of time is virtually the same.

They traverse the same sector of the State and converge into a single river near its southern boundary.

The decision now sought to be reviewed is likewise in conflict with *United States v. Appalachian Electric Power Company*, 311 U.S. 377, involving a section of the New River in West Virginia, which this Court determined to be navigable upon the authority of *United States v. Utah, supra*, notwithstanding the findings of the two lower courts that it was nonnavigable.

It is also impossible to reconcile the decision of the Court of Appeals of the Tenth Circuit with that of the Court of Appeals for the Seventh Circuit in *Wisconsin Public Service Commission v. Federal Power Commission*, 147 F.2d 743, wherein it was held that a river was navigable within the meaning of the constitutional provisions relating to interstate commerce, notwithstanding it was incapable of being used in such commerce except to float logs to market during very limited but regular periods of spring freshets.

The decision of the Court of Appeals deprives the State of Utah of its sovereignty and ownership of a natural water course which is capable of and has actually been used by the public for transportation in connection with trade, industry and commerce thereby frustrating the statute and the constitution which guaranty that Utah shall have equality of rights, privileges and sovereignty with those of the thirteen original states. It has declared this waterway which is clothed with a public interest to be subject to the private ownership and control of whoever may have title to the riparian land.

ARGUMENT

The tests of navigability are the same whether the question to be determined is the power of the government to control commerce on interstate rivers or the power of a state to control rivers within the borders. See *United States v. Appalachian Electric Power Company, supra.* This is to be expected, since there is no conflict between the powers of these two sovereigns. While this Court has not adopted any single definitive test of navigability, the controlling inquiry is whether the natural condition of the river—that is, volume of water, regularity of flow, and grade of channel—is such that it can be used when the need arises for transporting property or persons in connection with some trade or commercial activity. In other words, is it capable of public utility?

> "The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." The Montello, 20 Wall. 430.

The capacity of the San Juan River in 1896 for transportation in trade or commerce is established, not only by its natural condition and by actual demonstration, but also by comparison with the portions of the Colorado and Green Rivers determined to be navigable in *United States v. Utah, supra,* and with the sector of the New River found to be navigable in *United States v. Appalachian Electric Power, supra.* The San Juan River flows through exactly the same kind of territory as the Colorado and the Green

and has all the natural conditions of those two rivers. The character and extent of use of all three at the time of Statehood is the same. There is also a close similarity in impediments to use of the rivers by boats. Admittedly, there is a greater volume of water in the Green and the Colorado, but this difference is of no controlling importance.

The New River is likewise strikingly similar to the San Juan even as to volume of water. If there is a difference between these two rivers with respect to navigability, it is that the San Juan was used more than was the particular section of the New in controversy in the *Appalachian* case. The demonstrations of navigability of the San Juan are far more conclusive than any performed on the New River.

The Master did not base his finding of nonnavigability of the San Juan below Chinle Creek upon any insufficiency of or variation in the stream flow. The precipitous walls of the long deep canyon through which it flowed immediately below Chinle Creek, the numerous rapids, some of them as high as 35 feet, the large protruding boulders in the bed, and the inaccessibility of the waterway, were the considerations upon which the Master based his conclusion of nonnavigability. He found the same insurmountable obstacles to navigation that existed in the Colorado River through Cataract Canyon.

Neither of the courts below based their conclusions of nonnavigability upon the physical conditions of the River. Undue weight was given to incidents and events which have occurred in the life of the River and to obstructions, inconveniences and impediments to navigation. Mistakes were made in several important instances with respect to what

the evidence established. Uncontradicted and controlling facts were overlooked or ignored.

Aside from these errors in the findings, "the standards and ultimate conclusions of navigability involve questions of law inseparable from the particular facts to which they are applied." *United States v. Appalachian Electric Power Company, supra.* To the same effect are: *United States v. Rio Grande Irrigation Company,* 174 U. S. 690, *Economy Light Company v. United States,* 256 U. S. 113, *United States v. Holt State Bank,* 270 U. S. 49, *United States v. Utah,* 283 U. S. 64.

An additional reason why this court should make its own appraisal of the evidence of navigability is that it has original jurisdiction coordinate with that of the District Court. The judicial functions of this Court should not be made to turn upon the choice of forum made by the government.

The State of Utah is not asserting its sovereignty as against that of the United States. The evidence indicates clearly that the San Juan River is an interstate navigable stream. The Government has control over navigation on such rivers and the sovereignty of the State is subordinate to that control. By asserting the River to be nonnavigable and obtaining a decree to that effect, the Government precludes itself forever from exercising any sovereignty or control over the River. The public usefulness of this water course can be preserved only by adjudging the ownership and control of it to be in the State of Utah.

It is respectfully submitted that this Petition for a Writ of Certiorori should be granted.

Dated July 10, 1962.

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APPENDIX A

Opinion

(May 10, 1962)

Grant H. Bagley (Walter L. Budge, Attorney General, State of Utah, Clifford L. Ashton, and Van Cott, Bagley, Cornwall & McCarthy were with him on the brief) for Appellants.

Parker M. Neilsen, Assistant United States Attorney (Ramsey Clark, Assistant Attorney General, William T. Thurman, United States Attorney, C. Nelson Day, Assistant United States Attorney, Roger P. Marquis, and A. Donald Mileur, Attorneys, Department of Justice, were with him on the brief) for Appellee.

Before BRATTON, HUXMAN, and BREITENSTEIN, Circuit Judges.

BRATTON, Circuit Judge:

In United States v. Utah, 283 U.S. 64, sometimes hereinafter referred to as the earlier case, it was determined that the San Juan River from the mouth of Chinle Creek downstream to its confluence with the Colorado River, a distance of 133 miles, was non-navigable at the date of the admission of Utah to the Union on January 4, 1896. That case was decided in 1931.

In 1959, the United States instituted in the United States Court for Utah this action to quiet title in the United States to the land constituting the bed of the San Juan River in Utah from the boundary line between Colorado and Utah downstream to the mouth of Chinle Creek, a distance of approximately 55 miles, subject to rights of third parties not having pertinency here. Utah, George D. Fehr, Earl E. Fehr, Joe Lyon, Jr. and United Western Minerals Company,

a corporation, were joined as parties defendant. By answer, Utah asserted ownership of such land, subject only to mineral leases which it had executed to the defendants George D. Fehr and Joe Lyon, Jr.; and by counter-claim it sought to have its title thereto quieted. By answer, the defendants George D. Fehr, Earl E. Fehr, Joe Lyon, Jr. and United Western Minerals Company, asserted interests in the land under mineral leases issued by Utah; and by counter-claim, they sought to have such interests quieted. A stipulation was filed in the case in which it was agreed that the first issue to be determined was whether the segment of the river in question was navigable at the time Utah was admitted into the Union. It was further agreed that if it was determined that the river between such points was not navigable at that time, no other issues remained in the case. And it was further agreed that if it was determined that the river between such points, or any significant part thereof, was navigable on such date, certain other issues would emerge for consideration. A pretrial order was entered that there would first be a trial and determination of the question of navigability of the stream between the two points mentioned. The case was tried upon the sole issue of navigability. The court found and determined that no significant part of the river between the two points was navigable at the time Utah was admitted into the Union. Judgment was entered quieting title in the United States, and the appeal is from that judgment.

Title to the land constituting the bed of the San Juan River within Utah passed to the State when it was admitted to the Union if the river was then navigable; and it was not navigable, title remained in the United States. United States v. Utah, supra.

While applying the rule sometimes presents difficulty, it has been held without deviation over a long period of time that the test for determining the question of navigability of a river is whether the stream in its natural and ordinary condition is used or is susceptible of being used as a channel for commerce over which trade and travel is conducted or may be conducted in the customary modes on water. The Daniel Ball, 10 Wall. 557, 563; The Montello, 20 Wall. 430; United States v. Rio Grande Dam and Irrigation Co., 174 U. S. 690, 698; United States v. Cress, 243 U.S. 316; Economy Light & Power Co. v. United States, 256 U.S. 113, 121; Oklahoma v. Texas, 258 U.S. 574, 586; Brewer Oil Co. v. United States, 260 U.S. 77, 86; United States v. Holt State Bank, 270 U.S. 49, 56; United States v. Utah, supra; United States v. Oregon, 295 U.S. 1, 14; United States v. Appalachian Electric Power Co., 311 U.S. 377, 406. Navigability does not depend upon the mode or modes by which trade and travel is conducted upon the stream, but upon whether the stream in its natural condition is one which affords a channel for useful commerce. Brewer Oil Co. v. United States, supra. And navigability, in the sense of law, is not negatived or destroyed merely because of watercourse interruption caused by occasional natural obstructions or portages. *Neither is it essential* to navigability that the stream be open to navigation at all seasons of the year, or at all stages of the water. Economy Light & Power Co. v. United States, supra; United States v. Appalachian Electric Power Co., supra. But the general rule which emerges clearly from these cases considered collectively is that in order to be navigable in fact and in law, a river in its natural and ordinary condition must be used or be susceptible of use as a channel for commerce in one or more of the customary modes of trade and travel by water.

The substance of the major attack upon the judgment is that, tested by the general rule for determining navigability of a stream, there was insufficient basis of fact for the finding and determination that the San Juan River in the area in question was not navigable at the time Utah was admitted into the Union. The trial was extended and the evidence was voluminous. Some of the witnesses were aged persons with personal knowledge of parts of the stream area in question in the late years of the last century and the early years of the present century; and the testimony given by some witnesses at the trial of the earlier case with like knowledge was read in evidence. In general, the testimony of such witnesses concerning the river related to volume, flow, width, depth, irregularity, floods, dry periods, sediment content, quick-sand, sand bars, sand waves, shifts in channel, braided channel, freezes, use of boats, ferrying in going to and from trading posts, crossing on foot, crossing on horseback, crossing in wagons, driving animals across, and other activities. Films were exhibited. Expert witnesses testified, including persons with experience as pilots of river craft. And reports, records, and documents were placed in the record. According to these various types of evidence the weight to which it thought they were appropriately entitled, the court made these findings, among others. Except as noted in the findings, the river in the area in question has not changed its general characteristics since 1879. The river is unstable. It flows through a broad, sandy, flood plain which is from 1,000 to 5,000 feet wide and which is encased between rocky cliffs or steep slopes. The average slope of the river exceeds seven feet per mile. The river is exceedingly irregular in flow. By reason of the flat and sandy nature of the flood plain, the irregularity in flow, and the

rate of fall, the river is constantly shifting its channels. It runs in a single channel for only a short distance and generally has braided channels. For most of the time and most of the distance in question, it runs in from two to many channels at the same time; and none of such cannels presents an adequate or continuous channel for the passage of boats. The flow is generally low for most of the months of the year. On more than one occasion when the river ran dry, fish died in pools; and Indians found it necessary to dig in the river bed to secure water for themselves and their animals. Indians crossed the river frequently, usually on foot or on horseback; but they made and used small boats for ferrying purposes in going to and returning from trading posts. There was a gold rush along the river in about 1892 and 1893. Several hundred prospectors came into the country in search of gold. Most of them went along the stream to the point or points of activities by horseback, by burro, or by wagon; and most of their supplies were taken there in that manner. A few of the prospectors went downstream in small rowboats constructed locally and took with them small amounts of supplies, bedrolls, and equipment. None of them came upstream in boats. The record as a whole makes it clear that the court in its grapple with the ultimate question of navigability was sensitive to the general rule for determining the question; and that in reaching its conclusion upon the question, the court gave consideration to the several factors which threw light upon the question. The findings are adequately supported by the evidence and are not plainly wrong, due consideration being given to the opportunity of the court to observe the witnesses, to weigh their credibility, and to weigh their testimony, particularly the recollections of aged persons re-

lating to long-past conditions and events. In United States v. Appalchian Electric Power Co., supra, it was stated that in some cases involving the navigability of a water course, the court entered into consideration of the facts found below to determine for itself whether the proper legal tests had been applied to the facts found. We have exercised that function in this case. We think the trial court applied the proper legal tests to the facts found; and moreover, we share with the trial court the view that the part of the river in question was in fact and in law non-navigable at the time Utah was admitted into the Union.

The findings of fact are challenged on the ground that they fail to meet the requirements of Federal Rules of Civil Procedure 52(a), 28 U.S.C., which provides in presently pertinent part that in actions tried upon the facts without a jury, the court shall state the facts specially. It is argued that the findings consist of elaborate dissertations upon various isolated bits of evidence, erroneous statements of other items of evidence, exaggerated description of events, contortions of various incidents, and inaccurate and misleading comparisons of the San Juan River with other rivers; and that they fail to disclose how the court arrived at its decision. The intended purpose of the rule is to aid the appellate court in acquiring a clear understanding of the basis of the decision of the trial court. Tulsa City Lines v. Mains, 107 F. (2d) 377; United States v. Horsfall, 270 F. (2d) 107. We think the findings meet the requirements of the rule and therefore are not open to the criticism directed against them.

Complaint is made that the court erred in taxing costs against Utah. It is argued that being a sovereign state,

Utah was immunized from liability for costs. It is the general rule that in the absence of an authorizing constitutional or statutory provision, a state court may not tax costs against the State. But this case was not in a state court. It was in the United States Court for Utah. Utah was a party litigant as a defendant and as a cross-complainant. The court had jurisdiction of the cause and of the parties. The incidents of the hearing in the exercise of the jurisdiction of the court included power to tax costs. And in such circumstances, the attributes of sovereignty did not immunize the State against the taxing of costs against it. Fairmount Creamery Co. v. Minnesota, 275 U.S. 70. And it is further argued that the other defendants were not necessary parties to the litigation and therefore costs should not have been taxed against them. These parties asserted mineral interests in the lands in the river bed, and they sought judgment quieting their title to such interests. Except as otherwise provided by statute, the taxing of costs rests in the sound judicial discretion of the trial court, and the exercise of such discretion will not be disturbed on appeal except in case of abuse. Crutcher v. Joyce, 146 F. (2d) 518; T. & M. Transportation Co. v. S. W. Shattuck Chemical Co., 158 F. (2d) 909; Euler v. Waller, 295 F. (2d) 765. There was no abuse of discretion in this instance.

The judgment is

AFFIRMED.

APPENDIX B

Judgment

Twenty-Ninth Day, March Term, Thursday

May 10th, 1962

Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Utah and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 304

In the Supreme Court of the United States

October Term, 1962

STATE OF UTAH, GEORGE D. FEHR, EARL E. FEHR, JOE LOOS, JR., and UNITED WESTERN MINERALS COMPANY, a corporation, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 284

STATE OF UTAH, GEORGE D. FEHR, EARL E. FEHR, JOE LYON, JR., and UNITED WESTERN MINERALS COMPANY, a corporation, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-7a) has not yet been reported. The findings of fact and conclusions of law of the district court are found at pages 17-29 of the printed record in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1962 (Pet. App. B, 8a). The petition

for a writ of certiorari was filed on July 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the San Juan River from Chinle Creek in Utah to the Colorado state line was a non-navigable stream on January 4, 1896, the date on which Utah was admitted to the Union.

STATEMENT

This is an action to quiet title in which the United States claims ownership of the bed of the San Juan River in Utah between Chinle Creek and the Utah-Colorado boundary, subject to the rights of the Navajo Indian Tribe under specified executive orders and acts of Congress, its grantees, and the rights of riparian landowners (R. 4). The State of Utah claimed ownership of the bed of the San Juan River subject only to mineral leases it has issued to the other petitioners (R. 5).

The original title of the United States under the Treaty of Guadalupe Hidalgo of February 2, 1848, 9 Stat. 922, was stipulated (R. 12). All parties agreed that the first issue to be decided was whether any significant part of the San Juan River in the disputed area was navigable when Utah became a

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[1] The interest of the Navajo Tribe arises by virtue of treaties, executive orders and acts of Congress, which resulted in the establishment of the Navajo Reservation with a boundary extending to the middle channel of the San Juan River (R. 13).

state (R. 14-15). If not, the State could claim no title to the river bed lands. After trial of the issue of navigability, the district court held (R. 28):

> The San Juan River between the Utah-Colorado boundary and Chinle Creek, * * * on the date of Utah's statehood, January 4, 1896, was not a "navigable" water within the legal meaning and definition of the term "navigable" as applicable to a determination of the question of whether or not state title attaches to river bed lands within the several states.

The district court made extensive findings of fact and conclusions of law which summarized the great volume of testimony, depositions and exhibits presented in evidence at the trial (R. 17-29). The principal findings show that in the 55-mile area in controversy, the San Juan River has a substantially uniform rate of fall of seven feet per mile (R. 19-20). The fall here is comparable to the fall in the 133-mile downstream segment of the San Juan which was held non-navigable in *United States* v. *Utah*, 283 U.S. 64 (R. 20).

In the area in controversy, the San Juan flows through a broad, sandy flood plain which is from 1,000 to 5,000 feet wide (R. 20). Because of the nature of the flood plain, the irregular flow and the gradient, the river is constantly shifting its channels. Many times the channel has moved more than one-half mile in a very short period. The river in this area generally has braided channels and runs in a single channel only for very short distances. None

of the several channels presents an adequate or continuing channel for the passage of boats. "The testimony * * * showed considerable difficulty in this regard even at high stages of water and in modern shallow-draft small rubber rafts and small plastic glass motorboats" (R. 20).

The San Juan has an extremely irregular flow (R. 20). On a number of occasions it has run dry, and there is a recorded flood stage of 70,000 cubic feet per second in 1927, with an estimated high in 1911 of 150,000 c.f.s. (R. 20-21). The flow is generally low for most months of the year, running less than 1,000 c.f.s. (R. 21). The big runoff occurs when the snow melts, from April to June. Full flow is, for the most part, confined to this period. There are also flash floods which ordinarily occur in late summer and fall. While the San Juan has a long-time average flow of 3,000 c.f.s., it runs at 1,000 c.f.s. or less 60.9% of the time. It runs in excess of 3,000 c.f.s. only 18.4% of the time. The flow is 500 c.f.s. or less 22% of the time (R. 21).

The district court found the San Juan carried a total sediment load that was twice the amount carried by either the Green or Colorado Rivers in the areas determined to be navigable in United States v. Utah, *supra* (R. 21-22). The density of sediment is even greater, since the volume of flow is only one-third of the Colorado and one-half of the Green. The high sediment content gives rise to sand waves, which sometimes reach a height of 12 feet and present a dangerous obstacle to small boats (R. 22). The average slope of the San Juan in the controverted

area is seven feet per mile in comparison to 1.17 and 1.63 feet per mile on navigable parts of the Green and Colorado (R. 22).

The San Juan River has not changed its general characteristics since white men came to the area in 1879 (R. 23). On various occasions when the river has run dry the Indians found it necessary to dig in the river bed to secure water for themselves and their animals.

The district court made findings on the navigation history of the river (R. 24-26). There was some evidence of small boats being used to ferry persons across the river at trading posts and other points. Some gold miners and oil prospectors had used the river to carry supplies, bedrolls, etc., downstream in small boats. However, almost all of the miners and prospectors, their supplies and equipment were brought into the area on foot, by horse, burro or by wagon. In the past 20 years, two or three "river runners" have used the San Juan for transporting a relatively few passengers downstream for "thrill" purposes. There had been some navigation of the river in preparation for this lawsuit by types of boats not generally available in 1896.

The district court found that (R. 26):

> At low stages, the San Juan River in the area in controversy herein has insufficient water to permit the passage of any but small, rowboat type boats or small rubber rafts and then only downstream with no commercial load and with considerable difficulty. At high stages the San Juan River in the area in controversy herein becomes torrential, cutting and tearing its banks,

> swiftly changing channels, carrying excessive debris and an extremely high sediment load. The high stages of water persist for only relatively short periods of time each year, and the river current is then too swift and too dangerous as well as too uncertain to permit any use of the river for commercial navigation. These same conditions existed in 1896 and have persisted since that time.

Finally, the court found that the wheels, engines, equipment and fuel ordinarily used for boats that carried passengers and freight in 1896 were heavy, cumbersome and occupied a large part of the boat's carrying capacity (R. 26-27). "* * * [I]t would have been impossible to navigate a boat of any substantial size or such as would have been suitable for carrying passengers or freight in the then ordinary and customary mode of travel on water at the time Utah became a state" (R. 27).

In accordance with its determination that the San Juan in the area in controversy was a non-navigable stream, the district court entered judgment quieting title to the bed of the stream in the United States, subject only to the rights of the Navajos and riparian owners claiming under the United States (R. 29-30). Petitioners appealed to the Tenth Circuit and that court affirmed (Pet. App. A, pp. 1a-7a).

ARGUMENT

All the parties to this suit, and both courts, agree on the appropriate legal test of navigability. It is reflected in this Court's formulation in *The Daniel Ball*, 10 Wall. 557, 563:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[2]

Everyone likewise agrees that this case is governed by the general rule that title to the beds of rivers within a state passes to such state upon its admission into the Union only if the rivers are then navigable. See *United States* v. *Oregon*, 295 U.S. 1, 14; *United States* v. *Utah*, 283 U.S. 64, 75. Accordingly, the only remaining question is whether the courts below correctly applied the legal test to the facts as developed in the trial of this case.

The findings and conclusions of the district court and the opinion of the court of appeals clearly demonstrate that the San Juan River was, in fact, a non-navigable stream when Utah was admitted to the Union. The legal test of navigability was correctly applied. The decision below does not conflict with any decision of this Court nor of any other

[2] This test has often been repeated. See, *e.g.*, *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, where the Court re-examined the question in detail.

circuit court.[3] There is no novel question of federal law involved. There is no conflict with state law. Accordingly, there is no occasion for further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1962

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[3] Petitioners' assertion that the decision here conflicts with *United States* v. *Utah*, supra, *United States* v. *Appalachian Electric Power Co.*, *supra*, and *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F.2d 743 (C.A. 7), will not bear close examination. All three cases are clearly distinguishable on the question of navigability. It would be pointless to recite all the differences in history, topography and rainfall, justifying the findings of navigability in those cases. But it is worth repeating that in *United States* v. *Utah* a contiguous portion of the San Juan River, here involved, was found non-navigable by the Special Master and that Utah did not except to this finding. *Id.*, at 74.

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